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HUMAN RIGHTS LAW IN THE UK AFTER BREXIT

Tobias Lock*

I. INTRODUCTION

This article aims to assess the consequences of the vote of 23 June 2016 to leave the European Union (EU) for the protection of human rights in the UK. It commences as a stock-taking exercise and then outlines how withdrawal from the EU ('Brexit') will mark an important step towards a dis-entrenchment of human rights in the UK's constitutional order opening the door to far-reaching and potentially regressive human rights reform. It is argued that Brexit is likely to result in an overall weakening of fundamental rights protection in the UK in substantive terms with the loss of rights protected by the EU Charter of Fundamental Rights (Charter or CFR) and their unrealised potential; as well as in procedural terms with a loss of remedies against human rights infringements originating both in domestic and in EU law. This reduction in the level of protection is not compensated for by a possibly continuing indirect influence of EU fundamental rights standards on domestic protections – through continued adherence to the European Convention on Human Rights (ECHR) and from future cooperation between the EU and the UK, in particular in the field of data protection. In light of parallel efforts to substitute the Human Rights Act 1998 (HRA) for a British Bill of Rights (BBR) – likely to result in further constitutional instability and confusion, in particular if the devolved parts of the UK engage in efforts to counterbalance – the article concludes by mapping out some of the options for human rights reform open in light of Brexit. While this article is mainly concerned with the human rights implications of leaving the EU, it also provides a more general lesson on how the disentanglement of UK law from its EU law influences is likely to unfold.

II. BACKGROUND: THE UK'S CURRENT HUMAN RIGHTS LANDSCAPE

The UK's current (pre-Brexit) human rights landscape is characterised by a partial parallelism in human rights protection resulting from substantive overlaps between the HRA and the CFR. The CFR became binding with the Treaty of Lisbon in 2009 and has the same status as the EU Treaties.¹ It did not, however, introduce fundamental rights into EU law, which the CJEU had long protected as general principles of EU law.²

The Charter mirrors all the Convention rights currently guaranteed by the HRA,³ which itself gives effect to most of the ECHR rights the UK is bound to obey. In fact, Article 52 (3) CFR provides that the meaning and scope of Charter rights corresponding to those in the ECHR shall be the same as those laid down in the Convention.⁴

This parallelism between the HRA and the Charter is partial first because the Charter provides for broader substantive rights protection;⁵ and second because the scope of the Charter is limited. According to Article 51 (1) CFR it applies to Member States only 'when they are implementing Union

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¹ See Article 6 (1) TEU.

² Starting with Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114.

³ Mainly laid down in Titles I, II and VI of the Charter.

⁴ Even though the Charter may offer further protection.

⁵ See below at 4.

law.’ The Court of Justice of the EU (CJEU) has interpreted this broadly to mean that they are bound to comply with Charter rights whenever they are acting in the scope of EU law.⁶ This is the case either where a Member State is acting in pursuance of an EU law obligation, e.g. transposing a Directive into national law or applying a Regulation⁷, or when a Member State is derogating from one of the fundamental freedoms of the EU.⁸ Where this is not the case, the Charter does not apply.⁹

By making the applicability of Charter rights contingent on a broad notion of ‘implementation’, the CJEU made it clear that there are no areas of EU law that the Charter cannot apply to; and that there are no areas of domestic law of the Member States that are immune from Charter review.¹⁰ This is exemplified by the leading *Fransson* case, where a piece of Swedish legislation criminalising tax fraud and pre-dating Swedish EU membership was considered to come within the scope of EU law since the proceedings at issue concerned the evasion of VAT, which is heavily regulated by EU law.¹¹

Where Charter rights apply, they must be deemed directly effective.¹² Directly effective EU law is applicable and enforceable due to s. 2 (1) of the European Communities Act 1972 (ECA), so that the CFR can be directly relied upon in the courts of the UK. The Charter is also built into the devolution settlement. Acts of the devolved parliaments are not law if they contravene EU law and with it the Charter¹³ and the devolved executives do not have the power to act contrary to EU law.¹⁴ The CFR is dependent for its applicability in UK law on the ECA 1972, which is likely to be repealed with Brexit. While there are myriad possibilities for a future EU-UK relationship,¹⁵ there is no precedent for a non-EU Member State being formally bound by the EU Charter. Hence it will most probably cease to be binding on the UK and within its legal order.¹⁶ Brexit is therefore likely to have profound consequences for the future of human rights protection in the UK.

The HRA – the main instrument for the protection of human rights in the UK – will, of course, not be directly affected and the UK continues to be bound by the ECHR.¹⁷ Yet the UK Government’s continued commitment to replace the HRA with a BBR means that the UK’s human rights landscape

⁶ Case C-617/10 *Fransson* ECLI:EU:C:2013:105, para 19.

⁷ See e.g. Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* ECLI:EU:C:2011:865.

⁸ Case C-390/12 *Pfleger* ECLI:EU:C:2014:281, paras 35-37.

⁹ As for instance in Case C-206/13 *Siragusa* ECLI:EU:C:2014:126 or Case C-265/13 *Torralbo Marcos* ECLI:EU:C:2014:187.

¹⁰ Daniel Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50 *Common Market Law Review* 1267, 1278.

¹¹ *Fransson* (n 6) paras 24-31.

¹² Case 26/62 *van Gend & Loos* ECLI:EU:C:1963:1.

¹³ See s. 29(2)(d) Scotland Act 1998; s. 6(2)(d) Northern Ireland Act 1998; s. 94(6)(c) Government of Wales Act 2006.

¹⁴ See s. 57 (2) Scotland Act 1998; s. 80 Government of Wales Act 2006; s. 24(1)(b) Northern Ireland Act 1998.

¹⁵ See e.g. Cabinet Office, *Alternatives to membership: possible models for the United Kingdom outside the European Union*, 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504661/Alternatives_to_membership_possible_models_for_the_UK_outside_the_EU_Accessible.pdf.

¹⁶ This differentiates the Charter from other EU-based sources of rights such as anti-discrimination law transposed into the Equality Act 2010. Unless that Act is specifically repealed, anti-discrimination rights will continue to be applicable in the UK after Brexit.

¹⁷ In the context of Northern Ireland it is important to note that the British-Irish Agreement, which underpins the Good Friday Agreement, even places the UK under an international treaty obligation to ‘complete incorporation into Northern Ireland law of the [ECHR]’.

is likely to undergo profound changes in the near future.¹⁸ Whether this will lead to a strengthening or a weakening of human rights depends critically on whether the BBR will be ECHR plus or minus. This is a question which the current Government has not yet answered. Coupled with Brexit this contributes to uncertainty over the future of human rights law in the UK by adding another layer of legal complexity.

III. DIS-ENTRENCHMENT OF HUMAN RIGHTS LAW

The formal¹⁹ disappearance of EU fundamental rights law from the UK legal order will lead to a dis-entrenchment of human rights law more generally. Norms are considered to be entrenched when they are harder to change than other norms, e.g. if an amendment to a country's constitution requires popular approval.²⁰ Parliament is, of course, sovereign and therefore able to expressly repeal the HRA and the ECA without following a special procedure. Nonetheless, both statutes are immune from implied repeal,²¹ which results in a weak form of entrenchment.

More importantly, however, entrenchment is understood here primarily as a form of practical entrenchment,²² which takes into consideration the practical and political difficulties confronting the legislator when repealing legislation. Adopting this practical perspective, one can identify first, that the ECA is more difficult to repeal than the HRA as a repeal cannot occur in isolation from a change in the UK's international obligations; and second, that it could not in practice have happened without either prior approval by referendum or a clear manifesto commitment to this effect by the governing party.

The key difference between the ECA and the HRA is that a repeal of the HRA – which transposes the ECHR into domestic law – would not automatically put the UK in breach of the ECHR. In fact, it would merely reinstate the situation before its entry into force, where the UK found itself in a position signed up to an international treaty, with which it was sometimes unable to comply due to a lack of protection in domestic law. The ECHR is therefore a typical international treaty: it obliges parties to it to comply, but the manner in which they choose to comply is up to them. It does not purport to have any effects in domestic law. Notwithstanding the compulsory jurisdiction of the ECtHR, compared with EU law it lacks a serious enforcement mechanism: there is no public enforcement by way of infringement proceedings akin to Article 258 TFEU; nor does the ECHR provide for the possibility of private enforcement through a doctrine of direct effect.

EU law – and with it the Charter – is much more deeply entrenched due to its supranational character. Admittedly, from the perspective of UK law its recognition within domestic law theoretically hinges on the continued applicability of the ECA, which the Supreme Court described in *Miller* as a 'conduit pipe'.²³ Nonetheless, in *Miller* the Supreme Court clarified that – by contrast to rights derived from other treaties entered into by the United Kingdom – the ECA 'constitutes EU law

¹⁸ Justice Secretary Liz Truss, Oral evidence, House of Commons Justice Committee, 7 September 2016, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-secretary-of-state/oral/37565.html>.

¹⁹ As will be shown below, EU fundamental rights law is still likely to influence the law of the UK in the future.

²⁰ See e.g. Robert D. Cooter, *The Strategic Constitution* (Princeton University Press 2000) 1.

²¹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); this seems to have been accepted in principle by the Supreme Court, see e.g. *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 and *Kennedy v Charity Commissioner* [2014] UKSC 20.

²² This term is used by Ernest A. Young, 'The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda' (2008) 10 *Journal of Constitutional Law* 399, 402.

²³ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 80.

as an entirely new, independent and overriding source of domestic law.²⁴ The Supreme Court therefore recognised the special character of EU law and required that even changes to the UK's external commitments under EU law – such as withdrawal from the EU – needed parliamentary approval as they would result in a major change to UK constitutional arrangements.²⁵

An analysis suggesting that a simple repeal of the ECA – without a concomitant withdrawal from the EU – would automatically remove EU law from the UK legal order would be overly formalistic and divorced from reality given that from the perspective of EU law, it unfolds its effects without further implementing steps.²⁶ If Parliament legislated to deprive EU law of its domestic effects while the UK is still a member of the EU, this would be a breach of the EU Treaties. As it is an integral part of the EU's primary law, the UK can therefore only (legally) rid itself of the Charter by leaving the European Union altogether. What results is a much deeper practical entrenchment of EU fundamental rights in the UK's legal order than is the case with the ECHR through the HRA. While it would in theory be possible to repeal the ECA and deprive EU law of its applicability in UK domestic law, it is not clear how the Supreme Court would react if the ECA were repealed without replacement before the UK has formally left the EU.²⁷ The *Miller* case does not address this point. In addition, the European Commission would in all likelihood take the UK to the CJEU for infringement of the Treaties.

This demonstrates that in practice the hurdles to removing the EU Charter from UK law are high. A Member State is legally obliged to ensure that directly effective EU law, such as the Charter, is judicially cognisable in its domestic order.²⁸ This obligation only ceases to exist after withdrawal from the EU, which must follow the procedure set out in Article 50 TEU. Only when the UK has formally left the EU, will it be compatible with EU law to repeal the ECA and sever the legal ties that enable UK courts to give effect to EU law. Consequently, while the UK is still bound by the Charter, any attempt at human rights reform – e.g. a replacement of the HRA with a BBR offering less protection in some areas – would not fully achieve the goals of those advocating in favour of it: curbing the power of judges over Parliament; making the Supreme Court 'supreme'; and limiting 'vexatious' human rights claims.²⁹ The dis-entrenchment of human rights law following Brexit will make this possible, however.³⁰

²⁴ Ibid.

²⁵ Ibid, para 82.

²⁶ This chimes with the view adopted by the High Court in *Miller and Others v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), paras 66 and 41-42.

²⁷ See e.g. Paul Craig, 'Constitutional and non-Constitutional Review' (2001) 54 Current Legal Problems 147, 164 on the similar conundrum of what the courts would do if Parliament expressly derogated from EU law.

²⁸ Protocol No 30 – at the time of its adoption hailed as an opt-out from the Charter – does not change this, at least as far as rights corresponding to those guaranteed in the ECHR are concerned, see *N.S.* (n 7) paras 116-122, even though the CJEU left it open whether Article 1 (2) of Protocol No 30 results in an opt-out of the (mainly social and economic) rights contained in Title IV of the Charter.

²⁹ See the Conservative Party Manifesto 2015 and its policy document 'Protecting Human Rights in the UK', available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf.

³⁰ In theory this dis-entrenchment provides an opportunity for stronger human rights protection, which may not always be possible under today's regime resulting from the CJEU's *Melloni* decision (Case C-399/11 *Melloni* ECLI:EU:C:2013:107). In that case the CJEU held that Member States are only permitted to apply higher human rights standards as long as the 'primacy, unity and effectiveness of EU law are not thereby compromised'. If a BBR were to guarantee fair trial rights going beyond the guarantees in the Charter, such as a right to trial by jury, as a consequence of *Melloni* these rights could not be relied on to resist extradition on the basis of a European Arrest Warrant. After Brexit, this limitation would no longer exist.

Furthermore, Brexit will remove any constraints to withdrawal from the ECHR resulting from EU law.³¹ There is a question mark over whether EU membership is premised on Member States being signed up to the Convention. While there is no express stipulation to this effect in the EU Treaties, Article 49 TEU, which sets out the process for accession to the EU, requires prospective Member States to respect the EU's values, which include human rights. In its practice of assessing whether prospective Member States comply with these values, the European Commission regularly refers to Convention standards.³² Moreover, the Commission's new rule of law framework – aimed at strengthening the rule of law in existing Member States – refers amongst other sources to the case law of the ECtHR to define the content of 'respect for human rights' in this regard.³³ This suggests that compliance with the substantive human rights standards of the ECHR is a condition for EU membership. It moreover implies an expectation that prospective and existing Member States are signed up to the ECHR³⁴ so that withdrawal from the ECHR can be considered contrary to a Member State's obligations under EU law. The disappearance of this hurdle to withdrawal from the ECHR with Brexit constitutes further evidence for the dis-entrenchment argument advanced here.

IV. LOSS OF SUBSTANTIVE EU FUNDAMENTAL RIGHTS LAW

Where the Charter applies it provides for further-reaching substantive protection of fundamental rights than the HRA. Additional rights include a guarantee of human dignity; a right to physical and mental integrity; an express prohibition on human trafficking; an express right to conscientious objection; an express right to data protection; freedom of the arts and sciences; a right to marry that is not restricted to different-sex couples; freedom to choose and occupation; freedom to conduct a business; a right to asylum and against refoulement; strong anti-discrimination provisions; rights of the child; and the social protections contained in its Title IV.³⁵

While some of these rights and protections are also recognised in domestic law and in the case law of the ECtHR, they will no longer have the back-up of the Charter with Brexit. Judging from past developments in the case law of the CJEU and UK courts, the following analysis shows that Brexit is likely to result in 1) losses of rights currently only guaranteed by the Charter; 2) that even where parallel rights to the ones guaranteed by EU law are also guaranteed at the domestic and/or at the international level, EU law in some instances contains a particularly progressive interpretation, which will no longer be readily available to those living in the UK; and 3) there will be tangible rights losses for EU citizens in the UK, in particular as far as the right to family life is concerned. In

³¹ There appear to be no official plans to withdraw the UK from the ECHR. Then Home Secretary Theresa May said that the UK should leave the Convention (see BBC News 'Theresa May: UK should quit European Convention on Human Rights' <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36128318>), but has retracted from this citing as a reason that there was no majority in Parliament for taking this step (see Jessica Elgot and Rowena Mason, 'Theresa May launches Tory leadership bid with pledge to unite country' *The Guardian* (30 June 2016) <http://www.theguardian.com/politics/2016/jun/30/theresa-may-launches-tory-leadership-bid-with-pledge-to-unite-country>).

³² See e.g. European Commission Enlargement Strategy Paper COM(2015) 611 final.

³³ Communication from the Commission to the European Parliament and Council, 'A new EU Framework to strengthen the Rule of Law' COM(2014) 158 final/2.

³⁴ Further evidenced by the commitment to sign the EU up to the ECHR laid down in Article 6 (2) TEU; this commitment is only achievable if all Member States are parties, see e.g. Tobias Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' [2010] *European Law Review* 777.

³⁵ Note that Protocol No 30 to the Lisbon Treaty neither constitutes an opt-out from Title IV (Daniel Denman, 'The EU Charter of Fundamental Rights: How Sharp are its Teeth?' [2014] *Judicial Review* 160, 172) nor from the CFR as a whole: *N.S.* (n 7) para 121.

addition, people living in the UK will no longer directly benefit from any future development of these provisions.

A. The right to private life and data protection

The Charter's 'added value' came to the fore in the High Court's decision *Davis and others v Secretary of State for the Home Department*, where the compatibility of the Data Retention and Investigatory Powers Act 2014 (DRIPA) with Articles 7 and 8 CFR was at issue.³⁶ Parliament enacted DRIPA in response to the CJEU's declaration that the EU Data Retention Directive 2006/24/EC was incompatible with the Charter and therefore invalid in the case of *Digital Rights Ireland*.³⁷ DRIPA mirrors the Data Retention Directive in many respects in that it gives the Home Secretary wide-ranging powers to require telecommunications operators to retain all communications data – though not content – for up to twelve months.³⁸ The High Court held that DRIPA had to be considered an implementation of Union law according to Article 51 (1) CFR given that due to Directive 95/46/EC the field of data protection fell within the scope of EU law.³⁹ The High Court was therefore in a position to measure DRIPA and its implementing regulations by the substantive standards of the Charter set out in Articles 7 and 8 CFR and defined by the CJEU in *Digital Rights Ireland*.

In that case the CJEU had stipulated strict requirements before an interference with Articles 7 and 8 CFR could be justified. It required in particular that there had to exist minimum safeguards to protect the data retained. In addition, the CJEU held that far-reaching collection of everyone's communication data in a generalised manner without exception was disproportionate and found fault with the lack of objective criteria for access to the data by national authorities. According to the CJEU these would need to be made dependent on prior review carried out by a court or other independent body. Finally, the duration of the retention period had to be based on objective criteria. Given that DRIPA failed to comply with these standards, the High Court declared it inconsistent with EU law and disapplied it. The *Davis* case was appealed to the Court of Appeal, which requested a preliminary ruling from the CJEU. That ruling is still pending, but the Advocate General's opinion followed a similar line of argument as the High Court.⁴⁰

It has been argued that the requirements stipulated by the CJEU went further than what the ECtHR would require. A report by the independent reviewer of terrorism legislation points to the case of *Kennedy v United Kingdom*⁴¹ in which the ECtHR had accepted a prior authorisation even of access to the content of data by the Secretary of State⁴² so that the CJEU's requirement of prior authorisation by a court or other independent body would seem to go beyond that. While one can harbour some doubt as to whether *Kennedy* is pertinent here given that it dealt with authorisation in individual cases rather than wholesale retention notices, *Digital Rights Ireland* nonetheless suggests a

³⁶ *Davis and others v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin).

³⁷ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238.

³⁸ See the summary by the High Court of the maximum powers contained in DRIPA in *Davis* (n 36) para 65.

³⁹ *Ibid*, para 7; note that Directive 95/46 will cease to apply from 25 May 2018 and will be replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1.

⁴⁰ Joined Cases C-203/15 and C-698/15 *Tele2 Sverige and Watson*, Opinion of AG Saugmandsgaard Øe ECLI:EU:C:2016:572.

⁴¹ *Kennedy v United Kingdom* App no 26839/0 (ECtHR, 18 May 2010).

⁴² See David Anderson, *A Question of Trust - Report of the Investigatory Powers Review* (<https://terrorismlegislationreviewerindependentgovuk/wp-content/uploads/2015/06/IPR-Report-Print-Versionpdf>, 2015) para 5.77.

willingness on part of the CJEU – very much in line with Article 52 (3) CFR - to advance the field of data protection law without regarding itself constrained by the ECtHR's case law. If this strict stance is not in the future mirrored by the ECtHR and thus brought into UK law through the HRA,⁴³ Brexit is likely to lead to a loss of these data protection rights.

B. The right to be forgotten

The same tendency of the CJEU to advance the fundamental right to data protection is evident from *Google Spain* where it extended Articles 7 and 8 of the Charter to include a 'right to be forgotten'.⁴⁴ By considering internet search engines to be data processors under Directive 95/46,⁴⁵ the CJEU enabled individuals to invoke Charter rights against a private operator.⁴⁶ It ruled that 'the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful'.⁴⁷ This duty exists where a data subject requests the removal of a link from the list of results following a balancing exercise 'having regard to all the circumstances of the case [...] the information and links concerned in the list of results must be erased'.⁴⁸ Key factors are the continued relevance of the information yielded by the search, particularly in light of the length of time elapsed since they were first published⁴⁹ and the role of the data subject played in public life.⁵⁰ It is particularly remarkable that the CJEU held that the rights guaranteed in Articles 7 and 8 CFR 'override, as a rule, not only the economic interests of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name'.⁵¹ The 'right to be forgotten' is currently unique to the CFR. Its future in UK law depends on whether the UK courts – or the ECtHR for as long as its decisions still enjoy authority in the UK⁵² – will be willing to interpret the right to private and family life as providing similar protection. If they do not, this right will disappear from UK law together with the Charter once Brexit takes effect.

C. The right to a fair trial

Article 47 CFR additionally provides for a stronger protection of the right to a fair trial than Article 6 ECHR in that it is not restricted to cases concerning a person's 'determination of his civil rights and obligations or of any criminal charge against him.' The protection under the Charter is therefore wider in scope than that under the HRA and includes administrative proceedings, e.g. on tax⁵³ or immigration as the example of *ZZ* demonstrates.⁵⁴ In *ZZ* a dual French and Algerian national was refused admission to the UK. In making this decision the Home Office relied on Article 27 of the

⁴³ More on this below.

⁴⁴ Case C-131/12 *Google Spain* ECLI:EU:C:2014:317.

⁴⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

⁴⁶ *Google Spain* (n 45) para 60.

⁴⁷ *Ibid*, para 88.

⁴⁸ *Ibid*, para 94.

⁴⁹ *Ibid*, para 93.

⁵⁰ *Ibid*, para 97.

⁵¹ *Ibid*.

⁵² At present section 2 (1) HRA decrees that its decisions 'must be taken into account.'

⁵³ See *Total Ltd v HMRC* [2014] UKUT 0485 (TCC) para 91.

⁵⁴ *ZZ v Secretary of State for the Home Department* [2014] EWCA Civ 7.

Citizens' Rights Directive,⁵⁵ which allows EU Member States to restrict the free movement of EU citizens 'on grounds of public policy, public security or public health'.⁵⁶ The claimant's appeal of this decision lay with the Special Immigration Appeals Commission (SIAC), which is competent to decide where the Secretary of State has issued a notification to that effect based on grounds of national security.⁵⁷ The procedure before SIAC is split into an open procedure and a closed procedure, from which the applicant and his lawyers are excluded. His interests are instead protected by two special advocates. SIAC's judgment in ZZ's case was largely based on closed materials which were not disclosed to him. While SIAC was satisfied that there were sufficient grounds to exclude ZZ from the UK, ZZ himself was not informed of their content. His complaint related to violations of the right to a fair trial protected by Article 47 CFR, which was applicable given that the UK as the Member State concerned was implementing EU law.

ZZ demonstrates the added value of the Charter in such proceedings in two ways: first, Article 6 ECHR did not apply in this case as immigration cases do not come within its scope as they are neither concerned with the applicant's civil rights and obligations nor with criminal law. By contrast, Article 47 CFR does not contain that limitation. Second, the CJEU subjected compliance with Article 47 CFR in these cases to high hurdles. As a consequence, the standard adopted by the CJEU in immigration cases comes very close to that of the ECtHR in criminal cases and goes beyond the ECtHR's standard in the field of immigration.⁵⁸ A national authority must prove that state security would be compromised if full disclosure of the reasons were effected.⁵⁹ Moreover, where this is the case, the national procedure must ensure that to the greatest possible extent the adversarial principle is complied with⁶⁰, in particular the person concerned must still be informed of the essence of the grounds which constitute the basis of the decision.⁶¹

D. The right to family life in immigration law

The case of ZZ suggests further that Brexit will make a reduction in human rights protection in the area of immigration law easier to achieve. While ZZ centred on fair trial rights in connection with a refusal to admit an EU citizen into the UK, it shows that as far as EU citizens and their families are concerned, the fundamental rights standards of the Charter currently apply. The Charter thus backs up the privileged position that EU citizens enjoy when it comes to immigration. After Brexit, they are likely to fall into the 'normal' immigration framework and their human rights claims will be confined to the ECHR.

An interesting decision in this connection is *Carpenter* where the CJEU held that the right to family life under EU law can be invoked to prevent the removal of a person illegally present in the UK if they are married to a UK citizen who was making use of his free movement rights and therefore acting in the scope of EU law.⁶² If the situation had not come within the scope of EU law, the right to family life under Article 8 ECHR would not have offered that level of protection as it does not give a

⁵⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L157/77.

⁵⁶ Transposed into UK law as Regulation 19 (1) of the Immigration (European Economic Area) Regulations 2006.

⁵⁷ Regulation 28 of the Immigration (European Economic Area) Regulations 2006.

⁵⁸ Nik de Boer, 'Secret evidence and due process rights under EU law' (2014) 51 Common Market Law Review 1235, 1256-1261.

⁵⁹ Case C-300/11 ZZ ECLI:EU:C:2013:363, para 61.

⁶⁰ Ibid, para 65.

⁶¹ Ibid, para 68.

⁶² Case C-60/00 *Carpenter* ECLI:EU:C:2002:434.

general right to live where one chooses. *Carpenter* by contrast comes close to that once an (even slender) cross-border connection is established. Hence in the absence of EU law the spouse would have been removed from the UK.⁶³ It is likely that a BBR will additionally reduce the availability of the right to family life in deportation cases,⁶⁴ so that the loss of Charter rights for EU citizens will be felt even more acutely.

E. The loss of the Charter's potential

In the context of the previous paragraphs – concerned with the protection the Charter currently offers – it should be recalled that the Charter has only been in force since December 2009. Taking into account that the CJEU is only slowly clarifying the exact scope of the Charter and the inevitable time-lag between this clarification and national cases being argued on that basis, the main loss for the UK legal order might be found in the Charter's yet unfulfilled potential. The sheer breadth of rights (and principles) offered in the Charter and their often broader formulation compared with corresponding rights contained in the ECHR, suggest a large potential for stronger human rights protection than currently available, from which the UK and the people living there are likely to be excluded.

V. LOSS OF PROCEDURAL PROTECTIONS

The disappearance of the Charter from the UK legal order will also lead to a loss in procedural terms as far as the availability of EU law remedies against both domestic acts and EU acts is concerned.

A. EU law remedies

Despite the partial substantive parallelism between the Charter and the HRA described above, their procedural implications differ wildly. As EU law, the Charter takes primacy over conflicting domestic law, including Acts of Parliament. The primacy of EU law means that any national court, no matter what position in the judicial hierarchy it occupies, is obliged to disapply a national rule in conflict with directly applicable or effective European Union law, no matter what place in the domestic hierarchy of norms that rule has.⁶⁵

By contrast, where an Act of Parliament contravenes human rights protected by the HRA, the 'best' the HRA can offer a claimant is a declaration of incompatibility under s. 4 HRA – a possibility confined to the higher courts. Moreover, if a claimant does not succeed in the domestic courts, they can only get their case heard in Strasbourg after the exhaustion of domestic remedies,⁶⁶ whereas the CJEU can be involved and issue a binding judgment by way of a preliminary reference already at first instance. Even if recourse to the ECtHR results in a judgment finding a violation of ECHR rights, it is not in and of itself enforceable in the UK legal order.⁶⁷

⁶³ In Case C-34/09 *Zambrano* ECLI:EU:C:2011:124 the CJEU went even so far to extend this to (exceptional) situations where no cross-border movement had happened (yet).

⁶⁴ This is obvious from the Conservative Party's manifesto, which promises that the BBR 'will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation' and makes express reference to the 'so-called right to family life', see pp. 75 and 32 respectively. Its policy document 'Protecting Human Rights in the UK' explicitly mentions Article 8 ECHR on p 6, available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf.

⁶⁵ To this effect see: Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Case 106/77 *Simmenthal* ECLI:EU:C:1978:49 paras 16-17 and 22; *Internationale Handelsgesellschaft* (n 2).

⁶⁶ Article 35 ECHR.

⁶⁷ Best demonstrated by the ongoing stand-off between the UK and the Council of Europe concerning the implementation of the prisoner voting judgment in *Hirst v United Kingdom (No 2)* ECHR 2005-IX.

The substantive parallels and differences in enforceability between the CFR and the HRA are well captured in the case of *Bankharbouche and Janah*.⁶⁸ This Court of Appeal decision dealt with the question whether the right to a fair trial – guaranteed in Article 6 ECHR and in Article 47 CFR – can be invoked in order to restrict the scope of the State Immunity Act 1978. The two claimants respectively worked as a cook and a member of the domestic staff of two foreign embassies in London. They brought claims of unfair dismissal, failure to pay the minimum wage, breaches of the Working Time Regulations 1998, racial discrimination and harassment, and arrears of pay. The State Immunity Act confers general immunity from jurisdiction on other states, i.e. in strict application of the Act neither claim could be successful as the respondents were immune from jurisdiction.

The Court of Appeal considered whether this general immunity from jurisdiction was a) compatible with Article 6 ECHR as guaranteed by the HRA; and b) with Article 47 CFR. Both provisions are nearly identically worded⁶⁹ and guarantee the right to fair proceedings, implicit in which is a right of access to a court. The Court of Appeal recognised that these rights can be limited and that immunity from jurisdiction – as required by international law – can be such a limit. However, it came to the conclusion that the limitations on these rights went too far and were disproportionate.

The judgment laid open stark differences in the consequences of claims based on the HRA and claims based on the Charter. Unfair dismissal, failure to pay the minimum wage, and arrears of pay are based solely on domestic law, whereas the claims based on the Working Time Regulations and racial discrimination and harassment are based on domestic law implementing EU directives, so that Article 47 CFR could be invoked in their regard. As far as the claims based on English law were concerned, the Court of Appeal made a declaration of incompatibility under the HRA. By contrast, as far as the claims based on EU law were concerned, the Court of Appeal disapplied the State Immunity Act, i.e. it did not consider the two respondents immune from jurisdiction, so that a remedy could be granted.

The judgment made it obvious that the remedies available under EU law – disapplication of the Act of Parliament concerned resulting in the claimant succeeding in her claim – are stronger than under the HRA.

For the sake of completeness, one should mention that the Charter opens up the possibility of suing for damages under EU state liability rules.⁷⁰ However, this option is likely to remain more theoretical than practical given the high hurdles a claimant must overcome. Not only must he convince a court that there has been a breach of his Charter rights by a Member State authority acting within the scope of EU law and that this has caused him to suffer damage. He must also convince the court that this breach of EU law was ‘sufficiently serious’, which in practice is very difficult to do.⁷¹

B. Loss of the Charter as a basis for challenging EU measures

After Brexit it will no longer be possible to use the Charter as a standard for the review of EU measures. This may seem unsurprising given that after withdrawal from the EU the UK is no longer bound by EU measures and consequently should not have any legitimate interest in trying to invalidate EU measures in the EU courts. However, much depends on the future EU-UK relationship.

⁶⁸ *Bankharbouche v Embassy of the Republic of Sudan; Janah v Lybia* [2015] EWCA Civ 33.

⁶⁹ Apart from the restriction of Article 6 ECHR to civil and criminal matters, on which see above.

⁷⁰ Introduced in Joined Cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428 and refined in Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur SA v and Factortame* ECLI:EU:C:1996:79.

⁷¹ See e.g. Tobias Lock, ‘Is Private Enforcement of EU Law through State Liability a Myth? : An Assessment 20 Years after *Francovich*’ (2012) 49 *Common Market Law Review* 1675.

The closer that relationship, the more likely it is that the UK will have to comply with EU legislation. If this legislation is deemed incompatible with fundamental rights by a person living in the UK, they cannot rely on the Charter to challenge it and a UK Court will not be able to request a preliminary ruling from the CJEU on that question.

The Agreement on the European Economic Area (EEA) serves as an illustration of this point. It is founded on the principle of homogeneity, which means that new EU legislation is routinely transformed into EEA law by annexing it to the EEA Agreement.⁷² It thus becomes binding on EEA members, but they or their citizens cannot challenge the legislation before the CJEU for violation of EU primary law including the Charter. Equally, the EFTA court – competent to interpret the EEA agreement – does not have jurisdiction to review the validity of EU legislation incorporated into EEA law with the fundamental rights recognised as general principles of EEA law.⁷³

The only recourse available is to domestic fundamental rights as the EEA Agreement is lacking the distinct supranational features of EU law, primacy and direct effect. Hence a domestic court might refuse to allow the authorities of an EEA member to comply with that state's EEA obligations if it considers these obligations to be contrary to its human rights laws.⁷⁴ This shows that even if the UK became a member of the EEA – the closest thing to EU membership – this would not mean that there would be no way of subjecting EEA measures to fundamental rights scrutiny.

At the same time, there are two downsides to this compared with the situation as we currently find it: first, the protection under domestic law is only as good as domestic law allows. In other words, it is limited to domestic law protections and may not go as far as the Charter.⁷⁵ Second, if a violation of fundamental rights is found at the domestic level resulting in the non-compliance of the state concerned with its EEA obligations, this would place that state in breach of EEA law.⁷⁶ This may lead to the suspension of parts of the agreement or the adoption of unilateral safeguard measures.⁷⁷ Other close relationships between the EU and third countries – such as the EU-Swiss bilateral agreements – do not foresee the involvement of the CJEU and dispute settlement is non-judicial,⁷⁸ so there is no possibility of having EU measures reviewed by it either.

While the EEA is chiefly concerned with ensuring participation of EEA countries in the single market, the EU cooperates with its neighbours in other fields, which are more critical in human rights terms. A notable example are extradition arrangements closely mirroring those under the European Arrest

⁷² See Article 102 EEA Agreement.

⁷³ Carl Baudenbacher, 'The EFTA Court: Structure and Tasks' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2015) 139, 165; on fundamental rights in EEA law, see Páll Hreinsson, 'General Principles' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2015) 349, 374-375.

⁷⁴ See Arnfinn Bårdsen, *Fundamental Rights in EEA Law – The Perspective of a National Supreme Court Justice* (2015), available at: <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/fundamental-rights-in-eea-law---bardsen-03062015.pdf> [last visited 20 October 2016].

⁷⁵ See however the decision of the Norwegian Supreme Court of 29 January 2015 (HR-2015-00206-A, case no. 2014/1583), which showed a very far-reaching understanding of 'the best interest of the child' leading to a similar outcome as the CJEU's decision in *Zambrano* (n 63); however, the reasoning was partly based on Protocol No 4 to the ECHR, which the UK has not ratified.

⁷⁶ This could result in an inter-party dispute under the EEA Agreement resulting in a referral to the CJEU, but this has never happened, Christa Tobler, 'One of the Many Challenges After 'Brexit' - The Institutional Framework of an Alternative Agreement - Lessons from Switzerland and Elsewhere?' (2016) 23 *Maastricht Journal of European and Comparative Law* 575, 587.

⁷⁷ See Article 111(4) EEA Agreement.

⁷⁸ See Christa Tobler, 'Dispute Resolution Under the EEA Agreement' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2015), 195, 204-205.

Warrant. The agreement between the EU and Norway and Iceland on the so-called 'surrender procedure' shows this.⁷⁹ Much like the European Arrest Warrant, the agreement is based on a notion of mutual trust in the legal orders of the contracting parties,⁸⁰ so that the role of the authorities in each state affected 'should be limited to practical and administrative assistance'.⁸¹ This means in particular that the refusal to execute an arrest warrant surrender is restricted to a finite number of grounds – even though the preamble of the agreement makes it clear that it does not prevent a State from applying its constitutional rules relating to due process and other rights.

The case law of the CJEU shows how the Charter has recently been used to weaken mutual recognition somewhat. In the case of *Aranyosi* the CJEU interpreted the legal basis for the European Arrest Warrant – Framework Decision 2002/584/JHA – to allow for an exception to the principle of mutual trust in 'exceptional circumstances', in particular where the surrender of a person might result in a real risk of inhuman and degrading treatment contrary to Article 4 CFR.⁸²

After Brexit, this type of protection afforded by the CJEU would not be available in case the UK continued to take part in the European Arrest Warrant given that there would be no right to request a preliminary ruling from the CJEU. If a national court provided it, it would in all likelihood be contrary to the agreement and would provoke countermeasures.⁸³

VI. NONETHELESS: CONTINUED RELEVANCE OF EU FUNDAMENTAL RIGHTS LAW

Despite this weakening of the human rights framework, certain aspects of EU fundamental rights law are likely to remain relevant in UK domestic law: through the Great Repeal Bill, through dynamic interpretation of the ECHR where the ECtHR follows the CJEU's lead; and through the extraterritorial reach of certain Charter rights as exemplified by the CJEU's decision in *Schrems*. On the whole, however, these effects are likely to be limited to certain specific fields and cannot act as a replacement for the losses discussed.

A. The Great Repeal Bill

EU fundamental rights will continue to be relevant after Brexit if the Government's plan to enact a Great Repeal Bill, which 'will convert existing European Union law into domestic law,' is followed.⁸⁴ As far as the transformation of EU fundamental rights law into domestic law is concerned, the Government's White Paper on the Great Repeal Bill is somewhat muddled.⁸⁵ It expressly states that 'the Charter will not be converted into UK law,' but then goes on to say that fundamental rights guaranteed as unwritten general principles of EU law will continue to be relevant in the interpretation of the EU law converted into UK law. It is not entirely clear what this will mean in practice, but it seems as though by confining the effects of EU fundamental rights to questions of interpretation the Government wishes to curb their procedural strength outlined above, so that outcomes like in *Benkharbouche* will no longer be possible.

⁷⁹ Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, annexed to Council Decision 2006/697/EC [2006] OJ L292/1.

⁸⁰ See preamble of the agreement, *ibid*.

⁸¹ *Ibid*.

⁸² Case C-404/15 *Aranyosi* ECLI:EU:C:2016:198, paras 82-91.

⁸³ See the discussion by Bårdsen (n 74).

⁸⁴ Statement by the Secretary for Exiting the European Union David Davis, HC Deb 10 October 2016, vol 615, col 40.

⁸⁵ Department for Exiting the European Union, 'Legislating for the United Kingdom's Withdrawal from the European Union' Cm9446.

In this connection, it is helpful to compare the Government's general stance on the effects of EU law enacted by the Great Repeal Bill with that concerning EU fundamental rights. According to the White Paper EU law will continue to take primacy over conflicting Acts of Parliament and other domestic law enacted before the date of withdrawal from the EU. Legislation enacted after that date, by contrast, will take precedence over transformed EU law. It seems that by confining the role of EU fundamental rights to that of an interpretational aid, their effect will be different from that of EU law in general.

The White Paper further raises the question in how far substantive Charter rights will survive Brexit. The Government is adamant that the removal of the Charter 'will not affect the substantive rights that individuals already benefit from' and points to various international human rights treaties to which the UK is a party. Moreover, it supports this promise by pointing out that the Charter was not designed to create new rights, but merely to make the rights already existent, viz. the general principles, more visible. It thus seeks to reassure those concerned that all Charter rights could re-appear in UK law in the guise of general principles. Indeed, UK courts will be asked to read CJEU case law quoting the Charter as 'referring only to those underlying rights.' Hence EU fundamental rights as general principles will continue to have legal effects in the law of the UK.

However, this ignores the fact that many of the rights in the Charter had never been identified by the CJEU as general principles before its entry into force. Furthermore, future developments of Charter rights will not feature in UK law, unless the UK courts develop them independently, which is possible, but by no means guaranteed. This raises the additional question whether developments already in progress, such as the right to be forgotten, which is not expressly found in the Charter, will continue to apply in the UK. If the Great Repeal Bill follows the White Paper in this regard, this will be the case, but only for as long as there is no UK legislation introduced after the date of withdrawal, which contradicts this. Hence in the long term these rights may still disappear again.

B. The ECtHR following the CJEU's lead

Assuming that the UK will continue to adhere to the ECHR and continue to incorporate it in domestic law, EU law, and in particular the Charter, is likely to wield indirect influence on the interpretation of ECHR rights by the ECtHR. There is a tendency in the ECtHR to refer to developments under the Charter when dynamically interpreting ECHR rights.⁸⁶ As the Charter is a much more recent document, its drafters took the opportunity to update some of the rights contained in the ECHR and the ECtHR uses this fact to inform its own case law.

For instance, in *Bayatyan v Armenia* the Grand Chamber of the ECtHR expressly relied on Article 10 CFR in order to read a right to conscientious objection into Article 9 ECHR.⁸⁷ Article 10 CFR is modelled on Article 9 ECHR, but modernises it by explicitly recognising such a right. The Charter was therefore employed to justify the ECtHR's decision to overturn previous case law by the European Commission on Human Rights, which had adopted a stricter approach based on the wording of Article 4 (3) (b) ECHR, which suggests that the ECHR only protects conscientious objection if recognised by the contracting party.⁸⁸ In *Bayatyan* the ECtHR acknowledged a change in attitude towards conscientious objection by pointing to Article 10 CFR as evidence of a 'unanimous recognition of the right to conscientious objection in the Member States of the European Union as

⁸⁶ Starting with *Christine Goodwin v United Kingdom* ECHR 2002-VI; for a detailed discussion: Tobias Lock, 'The Influence of EU Law on Strasbourg Doctrines' (2016) 41 European Law Review 804, 819-820.

⁸⁷ *Bayatyan v Armenia* ECHR 2011.

⁸⁸ Starting with *Grandrath v Germany* app no 2299/64 DR 31, para 32.

well as the weight attached that right in modern European society.⁸⁹ This case and others⁹⁰ illustrate the willingness of the ECtHR to be inspired by developments under EU law, particularly when expanding the scope of Convention rights. Provided that the UK does not leave the ECHR or stop incorporating it into UK law, this development is likely to be reflected in UK human rights law.

C. The extraterritorial reach of Charter rights

The extraterritorial reach of the Charter came to the fore in the case of *Schrems*, which dealt with the transfer of personal data by Facebook Ireland to servers located in the United States.⁹¹ Article 25 of Directive 95/46 allows the transfer of private data to a third country if that country ensures an 'adequate level of protection'. The European Commission had adopted a decision based on that same provision stipulating that an adequate level of protection existed in the United States provided that an organisation transferring data there complied with the so-called safe harbour privacy principles.⁹² However, the principles could be limited in order to meet national security interests or law enforcement requirements and were subject to being overridden by United States law.

Faced with a claim that the transfer of personal data held by Facebook from the EU to the US violated Articles 7, 8 and 47 CFR, the CJEU held that Article 25 (6) of Directive 95/46 – allowing the Commission to certify that a third country complies secures an 'adequate protection' – had to be interpreted in light of Article 8 (1) CFR. This means that a third country hosting servers on which data from the EU is stored is required 'to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter'.⁹³ Hence a third country must in practice comply with Charter standards in order to qualify as a location for the storage of data collected in the EU.

The CJEU's strict stance on data transfers to third countries is likely to be extended to the transfer of Passenger Name Records (PNR). Relying on *Schrems* and *Digital Rights Ireland*, Advocate General Mengozzi considered the EU's draft PNR agreement with Canada to inadequately protect the rights laid down in Articles 7 and 8 CFR.⁹⁴ The Advocate General's Opinion is relevant for two reasons: first, it concerns the compatibility of an international agreement concluded between the EU and a non-Member State with fundamental rights. If the CJEU follows the approach taken by the Advocate General, this would mean that any future agreement between the UK and the EU on the transfer of data – necessary in the field of security cooperation – would need to comply with the Charter. Second, much like the *Schrems* decision, the Advocate General specifically requested that certain standards of data protection be complied with within the Canadian legal order. For instance, he required that the automated processing of such data needed to contain safeguards against being based on an individual's racial or ethnic origins, religion, political views, etc;⁹⁵ that individuals have access to effective judicial redress by way of judicial review if they believe that their rights have been

⁸⁹ *Bayatyan v Armenia* (n 87) para 106.

⁹⁰ E.g. *Neulinger and Shuruk v Switzerland* ECHR 2010 (referring to Article 24 CFR); *D. H. and others v Czech Republic* ECHR 2007-IV (adopting the methodology for ascertaining indirect discrimination from EU law); *Rantsev v Cyprus and Russia* ECHR 2010 (making reference to EU law in order to justify extension of Article 4 ECHR to human trafficking).

⁹¹ Case C-362/14 *Schrems* ECLI:EU:C:2015:650.

⁹² Commission Decision 2000/520/EC.

⁹³ *Schrems* (n 91) para 73.

⁹⁴ Opinion 1/15 *Opinion of Advocate General Mengozzi* ECLI:EU:C:2016:656.

⁹⁵ *Ibid*, paras 252-261.

infringed;⁹⁶ and that there needed to be an independent *ex ante* review of any disclosure of PNR data by Canada to third countries, which must ensure *inter alia* that the third country's authorities do not disclose the data.⁹⁷ This means that in order to be able to effectively cooperate with the EU in a manner that requires the transfer and handling of personal data, the UK would need to comply with the standards imposed by the EU. Otherwise, the EU is constitutionally unable to conclude such an agreement.

Once the UK has left the EU, the Charter will therefore continue to have some effect in the UK if the UK wishes to be able to host data servers keeping personal data collected in the EU. In order for the UK to qualify as a third country which affords an 'adequate level of protection' in its domestic law, it will by and large be required to replicate EU data protection standards. Moreover, the UK will have to continue to provide adequate legal protection for those seeking to access data relating to them and to obtain rectification or erasure of such data in accordance with Article 47 CFR.⁹⁸ Of course, the UK could introduce a separate regime for data coming from the EU, which would need to comply with higher standards, so that individuals living in the UK would not profit. This may not, however, prove practicable.

This section has shown that despite Brexit, the EU Charter is likely to continue to exert some influence over the level of human rights protection in the UK. However, this influence will be confined to some areas only and will only be indirect. While this finding can be welcomed from a substantive point of view, it is likely to contribute to fragmentation and confusion in an already complex system of human rights protection.

VII. CONCLUSION AND WAYS FORWARD

As the previous discussion has shown, apart from cases concerning the interpretation of EU legislation enacted by the Great Repeal Bill and some limited indirect influence, EU fundamental rights are likely to disappear from the UK legal order. Apart from substantive and procedural reductions in the protection available to individuals, this will also result in a dis-entrenchment of human rights protections in general. This development is likely to lead to heightened uncertainty in this area, in particular if the Government decides to go ahead with plans to repeal the HRA and replace it with a BBR.

It is important to note that even in the absence of HRA reform, Brexit alone will not restore human rights protection in the UK to any known *status quo ante*. This is because – as mentioned above – EU fundamental rights had been in existence – though not necessarily very visible at the UK level – in EU law since the very start of the UK's EU membership. While after Brexit these general principles – if the White Paper is to be believed – will only be applicable for the interpretation of EU law enacted by the Great Repeal Bill, the HRA will continue to protect human rights so that for the first time human rights protection would be solely based on domestic law. The resulting gaps might incentivise claimants to increasingly rely on the common law for protection. This could lead to renewed uncertainties as the common law has probably developed, but not been seriously tested, since human rights were first introduced into UK law.⁹⁹

⁹⁶ Ibid, paras 262-272.

⁹⁷ Ibid, paras 301-305.

⁹⁸ *Schrems* (n 91) para 95.

⁹⁹ Paul Bowen, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?' [2016] *European Human Rights Law Review* 361; and Brice Dickson, 'Repeal the HRA and Rely on the Common Law?' in Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights* (Hart 2015) 115.

Furthermore, the Government might use the opportunity of Brexit to reform domestic human rights law and introduce a British Bill of Rights. In terms of human rights protection, this need not necessarily be a bad development. However, it would bring with it the danger of a regression of human rights standards.

If Brexit results in a loss of human rights protections, the devolved parliaments of Scotland and Northern Ireland might decide to supplement whatever human rights protections might be left.¹⁰⁰ As far as Scotland is concerned, the Human Rights Act itself is protected from modification by the Scottish Parliament,¹⁰¹ but human rights are not a reserved matter so that the Scottish Parliament could pass a Scottish Bill of Rights adding to the rights protected by the HRA. The passage of a Bill of Rights for Northern Ireland by the Northern Ireland Assembly is even foreseen in the Good Friday Agreement, but has not been achieved yet. However, any devolved bill of rights would be a weak substitute for UK-wide guarantees as it would suffer from a number of deficits. In particular, it would be confined to acts of the devolved executives and (possibly) parliaments and could not be invoked against Westminster legislation or executive action.

This shows that the overall consequences of Brexit for human rights protection are not only likely to lead to a reduction in the level of substantive and procedural protection available to individuals living in the UK, but they are also likely to lead to heightened levels of legal uncertainty. The messy consequences predicted are best avoided by ensuring that the overall level of human rights protection currently existent is retained. It would therefore make sense to keep in domestic law the key protections of the Charter, in particular in the field of data protection law and fair trial rights. At the same time it will be difficult, if not impossible, to replicate the procedural strength of the Charter, so that almost inevitably something will be lost.

¹⁰⁰ The Welsh Assembly does not have legislative competence over human rights as this competence has not been conferred upon it.

¹⁰¹ Schedule 4 Scotland Act 1998.